No. 91-1393

In The

Supreme Court of the United States

October Term, 1992

A.L. LOCKHART, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Petitioner,

vs.

BOBBY RAY FRETWELL,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

WHETHER THE UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS ERRED IN CONCLUDING THAT RESPONDENT FRETWELL WAS DENIED HIS SIXTH AMENDMENT AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL FELONY MURDER TRIAL IN THAT HE SUFFERED PREJUDICE WHEN HIS TRIAL COUNSEL FAILED TO MAKE A "DOUBLE-COUNTING" OBJECTION, BASED ON THE EIGHTH CIRCUIT'S HOLDING IN *COLLINS V. LOCKHART*, 754 F.2d 258 (8TH CIR.), *CERT. DENIED*, 474 U.S. 1013 (1985), TO THE TRIAL COURT'S SUBMISSION TO THE JURY OF THE AGGRAVATING CIRCUMSTANCE OF PECUNIARY GAIN.

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SUMMARY OF ARGUMENT

The decision of the United States Eighth Circuit Court of Appeals in the instant case unconditionally vacating respondent's death sentence should be affirmed. Respondent was deprived of his right to the effective assistance of counsel under the Sixth and Fourteenth Amendments, when counsel at the sentencing phase of his trial for robbery-murder failed to raise an objection to the submission to the jury of the aggravating circumstance that the murder was committed for "pecuniary gain". Under the rule of *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U. S. 1013 (1985), valid law at the time of the trial, use of an aggravating circumstance which duplicated an element of the offense charged violated the Eighth Amendment. *Collins* held that such duplicative circumstances failed to narrow the class of death eligible offenders, providing no meaningful distinction between all convicted offenders and those deserving the death penalty. Had the appropriate *Collins*-based objection been raised, the jury would not have considered the "pecuniary gain" circumstance. Since no other aggravating circumstances were found by the jury, the respondent would have received a sentence of life without parole.

Collins was the law at the time of respondent's trial, and application of its rule would have prevented the jury from considering the aggravating circumstance of pecuniary gain. Apparently, however, respondent's trial counsel was unaware of the *Collins* decision and made no objection when the prosecution offered the jury instruction regarding the aggravating circumstance. His failure to so

object constituted deficient performance and resulted in prejudice to the respondent.

Respondent's claim of deprivation of his right to the effective assistance of counsel is governed by standards established by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). In order to prevail he must demonstrate that his claim satisfies both prongs of the *Strickland* test, i.e. (1) that counsel's performance was deficient, and (2) that the defendant performance resulted in prejudice to the defense. As the United States District Court noted in its opinion in *Fretwell v. Lockhart*, 739 F.Supp. 1334 (E.D. Ark. 1990), counsel had a duty to be aware of all law relevant to death penalty cases, and should have made a *Collins*-based objection. His failure to do so satisfies the first prong of the *Strickland* test. As noted above, in the absence of the "pecuniary gain" circumstance, the jury would have had no basis upon which to impose the death sentence. The reliability of the death sentence is therefore called into question, and the prejudice to respondent is obvious. He would have received a sentence of life without parole absent counsel's unprofessional error.

Some three years after the respondent's trial this Court decided the case of *Lowenfield v. Phelps*, 484 U.S. 231 (1988), which held that the "narrowing function" required for a regime of capital punishment may be provided in either of two ways: (1) The legislature may itself narrow the definition of the offense so that narrowing is performed by the jury at the guilt phase of the trial, or, (2) the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. Subsequently, in reliance on *Lowenfield*, the United States Eighth Circuit

Court of Appeals held in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U. S. 959 (1989), that *Lowenfield* overruled *Collins*. The petitioner argues that this subsequent change in the law should operate to eliminate the prejudice suffered by respondent. It is suggested that through the use of hindsight, this Court should view *Collins* as a "lawless decision", rule that it was never good law and that respondent should never have been entitled to its benefits. Once again, *Strickland* provides guidance. It states that in analyzing ineffective assistance claims, the reviewing court must "judge the reasonableness of counsel's challenged conduct as of the time of counsel's conduct." *Id.* at 690. Respondent urges the Court to follow *Strickland* and recognize that counsel's conduct was unreasonably deficient, and that there exists a reasonable probability that the outcome of the proceeding would have been different but for counsel's deficient performance.

While respondent's argument rests on the strength of *Strickland*, and its proscription against the use of hindsight, respondent also contends that the *Collins* decision has continued validity. The argument on this issue posits that application of *Lowenfield* to the Arkansas capital punishment scheme represents an overexpansion of its rule. In other words, "double-counting" of an aggravating circumstance which duplicates an element of the capital offense remains, under a statute such as Arkansas', an impermissible Eighth Amendment violation. Since the Arkansas statute does not narrow the class of death eligible offenders by definition of the offense, narrowing must occur through findings of aggravating circumstances at the penalty phase of the trial, and mere duplication of an

element of the offense provides no meaningful distinction between the class of all capital offenders, and those deserving the death penalty. *Lowenfield*, respondent contends, was not intended to address statutory schemes sueh as Arkansas' where no narrowing occurs within the definition of the offense.

As stated above, respondent's argument for affirmance is not dependent on the continuing validity of *Collins*. Nevertheless, this case presents the issue of *Lowenfield's* applicability to a statutory scheme such as Arkansas', and, should the Court reach the issue, its resolution will provide much needed guidance on this point.

Finally, respondent argues that the only remedy which will remove the taint of prejudice he has sustained is to affirm the decision of the Eighth Circuit to unconditionally reduce his sentence to life without parole. To resentence him under the law as it now exists virtually assures that he will receive the death penalty, and ignores the fact that he was deprived of his Sixth Amendment right to the effective assistance of counsel.

ARGUMENT

THE UNITED STATES EIGHTH CIRCUIT COURT OF APPEALS CORRECTLY FOUND THAT RESPONDENT WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL FAILED TO OBJECT TO THE SUBMISSION TO THE JURY OF THE AGGRAVATING CIRCUMSTANCE OF PECUNIARY GAIN AT THE PENALTY PHASE OF HIS CAPITAL FELONY MURDER TRIAL.

A. Introduction

As the United States Eighth Circuit Court of Appeals found in *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991), respondent Fretwell was deprived of his Sixth Amendment right to the effective assistance of counsel at his state court capital felony murder trial. When counsel failed to object, pursuant to *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985), to the submission of the aggravating circumstance of pecuniary gain at the penalty phase of respondent's trial for robbery-murder, his performance was deficient and respondent was prejudiced. See *Strickland v. Washington*, 466 U.S. 668 (1984), establishing the two-prong test of deficient performance and resulting prejudice for ineffective assistance claims. The petitioner argues, however, that because *Collins* was ultimately overruled by the United States Eighth Circuit Court of Appeals (some three years after respondent's trial), in reliance upon *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), it was a "lawless decision" at the time of respondent's trial. Petitioner's Brief, p. 48. As such, according to petitioner, the trial court would not have heeded its directive and

would have denied counsel's *Collins*-based motion had one been made. Thus, according to *Perry*, the outcome of the proceeding would have been the same, i.e. Fretwell would have received the death penalty, and could not claim that he suffered prejudice. Respondent submits, however, that at the time of his trial there was no other law on point, besides *Collins*, construing the Arkansas capital punishment scheme, and that there is no logical reason to assume that the trial court would have ignored the controlling law had counsel made the appropriate objection. Thus there is a "reasonable probability" that the outcome would have been different if the motion had been made, i.e. Fretwell would not have received the death sentence. The prejudice to Fretwell is obvious and the *Strickland* test is met.

Although *Strickland* is clear that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct," *Id.* at 690, petitioner employs the benefit of hindsight to suggest that Fretwell never had a right to the benefit of *Collins*. In support of this argument petitioner points out that analysis of ineffective assistance claims should not be limited to mechanical application of the "outcome determinative" approach, but should address the larger question of whether the respondent was deprived of a fundamentally fair trial, or was denied a right guaranteed by the Constitution. Petitioner argues that because *Collins* was overruled, Fretwell's claim is based on a perceived right not granted by the Constitution, such as that discussed in *Nix v. Whiteside*, 475 U.S. 157 (1986), and that to grant him relief would confer upon

him a "constitutional windfall" as discussed by Justice Powell in his concurring opinion in *Kimmelman v. Morrison*, 477 U.S. 365 (1986). Fretwell submits that both *Nix* and *Whiteside* are distinguishable from his case. He seeks redress for the deprivation of a fundamental right, the right to the effective assistance of counsel, based on a claim of the deprivation of another fundamental right, the right to be free from the arbitrary imposition of the death penalty conferred by the Eighth Amendment. These rights are both fundamental and personal, unlike the nonexistent right to commit perjury claimed in *Nix*, or the windfall conferred by the exclusionary rule discussed in *Kimmelman*.

Strickland makes clear that "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Such an assessment can lead to but one conclusion, that Fretwell was deprived of the benefit of valid law existing at the time of his trial. That *Collins* was ultimately overruled, long after respondent's trial, should not and cannot under *Strickland*, be held to relate back to remove the taint of prejudice suffered by respondent due to counsel's deficient performance.

Respondent's argument for affirmance rests on the strength of *Strickland*, and this Court should recognize his claim of ineffective assistance on that basis, viewing the claim in light of the facts and law which existed at the time of his trial. Petitioner's argument, on the other hand, reaches beyond *Strickland*, as it must, and relies on the use of hindsight to support the premise that *Collins* was

never good law, and that Fretwell was therefore never entitled to its benefit. As the Eighth Circuit noted in its opinion below, *Collins* was good law at the time of respondent's trial, and, respondent submits, it has continuing validity. While respondent's claim does not depend on *Collins'* resurrection, this case places the issue before the Court and provides an opportunity for clarification of the applicability of *Lowenfield* to the Arkansas capital punishment regime.

B. *Strickland v. Washington*, 466 U.S. 668 (1984).

1. *First Prong – Deficient Performance.*

Petitioner correctly asserts at page 21 of its brief that analysis of this issue must begin with the landmark decision of *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* establishes a two-prong test for analysis of ineffective assistance of counsel claims. "First the defendant must show that trial counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. Respondent submits, and petitioner does not suggest otherwise, that the first prong of the test was met when trial counsel failed to move to preclude submission of pecuniary gain to the jury as a possible aggravating circumstance. As stated by the District Court, the rule of *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985), "was the law of the Eighth Circuit at the time of [Fretwell's] trial . . . ", and "as an attorney representing a defendant in a capital case, trial counsel had a duty to be aware of all law relevant to death penalty cases."

Fretwell v. Lockhart, 739 F.Supp. 1334 (1990). See also *Harrison v. Jones*, 880 F.2d 1279 (11th Cir. 1989), (Counsel's failure to object to the introduction of petitioner's prior conviction based on *nolo contendere* plea, at subsequent criminal trial, clearly outside the range of professionally competent assistance); *Murphy v. Puckett*, 893 F.2d 94 (5th Cir. 1990), (Counsel was ineffective when he failed to raise valid claim of double jeopardy at petitioner's armed robbery trial). Trial counsel should have been aware of the *Collins* decision, and should have at least attempted to use it to benefit his client. His failure to do so was clearly outside the range of professionally competent assistance.

2. *Second Prong – Resulting Prejudice.*

Since counsel's performance was deficient, the only question remaining is whether respondent suffered prejudice because of this deficient performance. *Strickland* indicates that mechanical rules are inappropriate to this type of inquiry, and that the primary issue is whether the result of the proceeding is unreliable. In Fretwell's case, the answer to this question is apparent. If the objection had been granted, and there is no reason to assume that it would not have been, only one possible aggravating circumstance would have remained for the jury's consideration, that the "capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody." Ark. Code Ann. § 5-4-604(5). Since the "avoiding apprehension" aggravating circumstance was not found by the jury, there would have been no basis upon which to return the death sentence. The outcome would have been different in that Fretwell

would have received a sentence of life without parole. The death sentence is therefore an unreliable verdict and the *Strickland* test is met.

That the trial court might have engaged in an alternative analysis and applied the reasoning of *Jurek v. Texas*, 428 U.S. 262 (1976), to arrive at the conclusion that *Collins* was wrong, is, to say the least, unlikely. This argument does nothing more than suggest a possibility for which there is little or no support. *Jurek* construed the Texas capital punishment scheme, which, respondent submits, would have been an initial deterrent, in the face of *Collins*, to the trial judge recognizing it as applicable. Had the judge gone further, he would have recognized that significant differences in the Arkansas and Texas laws render *Jurek* inapplicable. *Lowenfield*, which was grounded in part upon an expansion of the *Jurek* holding, does stand for the proposition that the "narrowing function" required by the Eighth Amendment may be performed in either of two ways – through the finding of guilt based on a narrow legislative definition of the crime, or by consideration of aggravating circumstances at the sentencing phase of the trial. However, it was not until that decision was reached that the continued validity of the *Collins* decision was even considered. The law in the Eighth Circuit at the time of Fretwell's trial was the rule in *Collins*.

Once again, the question under *Strickland* is whether a "reasonable probability" exists that the outcome would have been different, not whether a possibility exists that it might have been the same. *Strickland* also states, that:

> In making a determination whether the specified errors resulted in the required prejudice, a court should presume, absent a challenge to the judgment on the grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification', and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably conscientiously, and impartially applying the standards that govern the decision.

and,

> When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating circumstances did not warrant death.

Id. at 694-95.

Despite petitioner's suggestion to the contrary, Fretwell is not seeking "entitlement to the luck of lawless decisionmaker," but is asking the Court to recognize that he has been the victim of a lawless decisionmaker. The jury was lawless to the extent that it was not properly instructed, an error which prejudiced the outcome of the trial. Had the jurors been instructed according to law, i.e., had the judge withheld the aggravating circumstance of pecuniary gain from their consideration, Fretwell would not have received a death sentence. The record is clear

that although the jury considered an additional aggravating circumstance, they rejected it and found only that the murder was committed for the purpose of pecuniary gain. The prejudice to Fretwell is clear.

Petitioner has posited four hypothetical situations in an attempt to demonstrate that Fretwell did not suffer prejudice. *See* Petitioner's Brief at pp. 51-54. Contrary to the rule of *Strickland*, the petitioner has employed the use of hindsight, assuming facts and law which did not exist at the time of respondent's trial, to create the suggestion of no prejudice. However, when viewed in light of the law and facts in existence at the time, the hypothetical scenarios clearly support the lower courts' findings of prejudice. A discussion of each of the hypotheticals, under appropriate facts and law, follows:

1. Petitioner hypothesizes here that competent counsel made an appropriate objection to the aggravating circumstances of pecuniary gain and that the objection was sustained. Thus pecuniary gain was not submitted to the jury. Inexplicably, petitioner asserts that respondent suffered no prejudice because he still would have received the death penalty. This argument is without merit in that it is based on pure supposition and not on the facts of respondent's case. Respondent would not have been sentenced to death. The only aggravating circumstance found by Fretwell's jury was pecuniary gain. The jury rejected the other aggravating circumstance, "avoiding apprehension", which was submitted. Absent the "pecuniary gain" aggravating circumstance, none existed. Consequently, Fretwell would not and could not have been sentenced to death. Prejudice is evident.

2. In the second hypothetical petitioner posits that effective counsel made the appropriate objection; that the objection was overruled; and that the respondent received a sentence of death, evidently based upon the pecuniary gain aggravating circumstance. Further, petitioner argues a lack of prejudice assuming respondent's appeal on the issue would have been decided adversely to him. This assumption is simply foundationless. At the time of respondent's trial *Collins* was the law of the Eighth Circuit. There is absolutely no basis for an argument that, had the issue been properly preserved, respondent would not have prevailed on appeal. *Lowenfield* and *Perry* were not in existence and were not the law that applied to respondent at the time of his trial and his appeal. *Collins* was the law then, and as is argued elsewhere in this brief, is still viable. To say respondent would have lost this issue on appeal pre-*Lowenfield* is, at best, wishful thinking on the part of petitioner and not based upon the law in effect during the relevant time frame. Respondent was, in fact, prejudiced because, at the time of his conviction and sentence, he would have prevailed on appeal.

3. The petitioner's third hypothetical situation is, perhaps, the least applicable and least reasonable. If competent counsel had made the appropriate objection, the objection had been overruled, and the respondent had received a sentence of life without parole, this would not be an issue. Respondent could not and would not have appealed the submission of an aggravating circumstance which was not found. Appealing the improper submission of an invalid aggravating circumstance upon receipt of a life sentence would be tantamount to asking for an

advisory opinion, something the Arkansas appellate court declines to give. In fact, petitioner concedes that respondent would have lacked standing in this instance. Ultimately, had respondent received a sentence of life without parole he would not and could not have argued the invalidity of the pecuniary gain aggravating circumstance on appeal. Again, the prejudice suffered is apparent.

4. The petitioner's fourth hypothetical, which is termed the core of the argument accepted by the Eighth Circuit Court of Appeals, is factually what could and should have happened at respondent's trial. Competent counsel makes the objection that should have been made, and the trial court properly follows controlling authority and sustains the objection. Only the "avoiding apprehension" aggravating circumstance is submitted to the jury and the jury finds that the state's proof does not sustain a finding of the existence of this circumstance. Having failed to find the existence of at least one aggravating circumstance, the jury must sentence respondent to life without parole. This conclusion is dictated by law and involves no assumption whatsoever about the "process of decision" because the jury's rejection of the existence of additional aggravating circumstances, or the result of the jury's process of decision, is apparent on the face of the record. Again, the prejudice is apparent.

In short, the scenarios hypothesized by petitioner merely serve to demonstrate the actual prejudice suffered by respondent.

The petitioner next points out that in *United States v. Cronic*, 466 U.S. 648 (1984), this Court stated (internal citations omitted):

> The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. 'Truth,' Lord Eldon said, 'is best discovered by powerful statements on both sides of the question.' This dictum describes the unique strength of our system of criminal justice. 'The very strength of our system is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.' It is that 'very premise' that underlies and gives meaning to the Sixth Amendment. It 'is meant to assure fairness in the adversary criminal process.' Unless the accused receives effective assistance of counsel, 'a serious risk of injustice infects the trial itself.'
>
> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted, even if defense counsel may have made demonstrable errors, the kind of testing envisioned by the Sixth Amendment has occurred.

Id. at 655-56. In *Cronic* the Court emphasized that strong statements of position on both sides of a criminal proceeding are essential to the discovery of truth. In Fretwell's trial, because of counsel's ignorance of the law, no statement of position, strong or otherwise, was made

regarding the issue of the invalid aggravating circumstance, and there was therefore, no opportunity for the adversarial testing of the issue envisioned in *Cronic*. Neither the judge nor the jury had the opportunity to consider the issues which would otherwise have been put before them. Not only "a serious risk of injustice" developed, but an actual injustice occurred when Fretwell was sentenced to death.

Strickland and *Cronic* do not support the petitioner's contention that respondent suffered no prejudice when his counsel failed to make a *Collins*-based objection. To the contrary, they serve to focus the inquiry on the facts as they existed at the time of Fretwell's trial. Because counsel did not object, Fretwell received a death sentence. Fundamental fairness insuring a reliable result was not served. The jury was not acting according to law and Fretwell was shackled with a lawless decision. There is more than a reasonable probability that the outcome of the proceeding would have been different if counsel had objected – there is a virtual certainty.

C. *Nix v. Whiteside*, 475 U.S. 157 (1986).

Following its argument that respondent has not suffered prejudice and should not be entitled to the luck of a lawless decisionmaker, petitioner suggests that the case of *Nix v. Whiteside*, 475 U.S. 157 (1986), shows that Fretwell has not been deprived of a right conferred by the Constitution. In *Nix*, this Court held that trial counsel at defendant's murder trial was not ineffective when he successfully dissuaded the defendant from committing

perjury at his trial. The Court stated (internal citations omitted):

> We hold that, as a matter of law, counsel's conduct complained of here cannot establish the prejudice required for relief under the second strand of the *Strickland* inquiry. . . . According to *Strickland*, '[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.' The *Strickland* Court noted that the 'benchmark' of an ineffective assistance claim is the fairness of the adversary proceeding, and that in judging prejudice and the likelihood of a different outcome, '[a] defendant has no entitlement to the luck of a lawless decisionmaker.'

Id. at 175. Justice Black, in a concurring opinion, stated:

> . . . the privilege every criminal defendant has to testify in his own defense 'cannot be construed to include the right to commit perjury.' To the extent that Whiteside's claim rests on the assertion that he would have been acquitted had he been able to testify falsely, Whiteside claims a right which the law simply does not recognize.

Id. at 185.

Petitioner emphasizes that the Court found that Whiteside had "no entitlement to the luck of a lawless decisionmaker", and suggests that respondent seeks the same entitlement. The lawless decisionmaker of which Whiteside sought to avail himself, however, was a jury which heard, believed and acted upon defendant's perjured testimony. Fretwell, on the other hand, seeks to avail himself of a jury which was properly instructed according to the law as it existed at the time of his trial.

While Whiteside admittedly had no right to perjure himself, Fretwell did have a right guaranteed by the Eighth Amendment to be free from the arbitrary imposition of the death penalty and a right to have his sentencing jury properly instructed on the law existing at the time.

The Solicitor General, in its amicus brief, asserts that Fretwell's claim is like Whiteside's because he seeks to avail himself of "a right the law simply does not recognize." Solicitor General's Brief, p. 14. This assertion ignores, as does the petitioner's argument, that under valid law as it existed at the time of Fretwell's trial, the relevant time-frame for purposes of analysis of an ineffective assistance claim, Fretwell did have a fundamental right, pursuant to the Eighth Amendment, to have the jury instructed according to existing law. The Solicitor General makes the broad statement, that "the Eighth Amendment confers no right on a defendant to prevent the jury from imposing the death penalty based on a factor that was also an element of the underlying offense." As this Court has noted, and as will be discussed in greater detail, *infra*, the Eighth Amendment does confer such a right under a statutory scheme which fails to narrow the class of death eligible offenders within the definition of the offense.

In *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), the Court stated:

> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

Lowenfield held that in states such as Louisiana and Texas, aggravating circumstances which duplicate an element of the offense are harmless because aggravating circumstances are unnecessary for narrowing purposes under those statutes. Since the narrowing occurs through the definition of the offense, and is therefore served by the jury's findings at the guilt phase of the trial, it is of no constitutional concern for the jury to consider an aggravating circumstance during the penalty phase which fails to further narrow the class of death eligible offenders. Arkansas, on the other hand, does not narrow the class of death eligible offenders at the guilt phase by definition of the offense, and therefore falls within the second group of regimes of capital punishment discussed in *Lowenfield*, i.e., those where the legislature has more broadly defined capital offenses and provided for narrowing by jury findings of aggravating circumstances at the penalty phase. Therefore, the aggravating circumstances are indispensable as the only means by which the constitutionally mandated narrowing function may occur, and a circumstance which merely duplicates an element of the offense offers no meaningful distinction between the class of all guilty offenders and those who should receive the death penalty.

It is clear that the Constitution does not confer the right to commit perjury; hence, Whiteside's ineffective

assistance claim must fail. It is equally clear that the Eighth Amendment does confer a right to meaningful narrowing of the class of death eligible offenders, and that respondent was deprived of that right by his counsel's deficient performance. Again, Fretwell does not seek "entitlement to the luck of a lawless decisionmaker", such as the jury tainted by perjury in *Nix*, but asks only that he be given redress for the lawlessness which occurred in his trial due to counsel's deficient performance.

D. *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

The case of *Kimmelman v. Morrison*, 477 U.S. 365 (1986), petitioner claims, sheds light on the prejudice analysis process necessary to resolution of this case. In *Kimmelman* the Court held that an ineffective assistance claim based on counsel's failure to timely discover and move to preclude admission into evidence certain illegally seized but reliable evidence, was not barred from review on federal habeas corpus by the limitation of *Stone v. Powell*, 428 U.S. 465 (1976). Petitioner makes an argument based on Justice Powell's concurring opinion in *Kimmelman* that the respondent suffered no prejudice herein because his trial was fundamentally fair. He further contends that granting respondent relief in this case is the equivalent of the "constitutional windfall" that the defendant in *Kimmelman* could have received. Justice Powell suggested that prejudice within the meaning of *Strickland* could never result from counsel's failure to obtain the suppression of reliable evidence. He stated, 477 U.S. at 396, that "the admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict." Therefore, "the harm suffered by

respondent in this case is not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall."

Just as Fretwell does not claim a right not conferred by the Constitution, neither does he claim entitlement to a windfall. The distinction between *Kimmelman* and this case is in the nature of the rights claimed, and the reasons the rights exist. As explained by Justice Powell "the admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict. We have held repeatedly that such evidence is excluded only for deterrence reasons that have no relation to the fairness of the defendant's trial." *Id.* at 397. And:

> The exclusionary rule does not exist to remedy any wrong committed against the defendant, but rather to deter violations of the Fourth Amendment by law enforcement personnel.

Whereas,

> . . . the right to effective assistance of counsel is personal to the defendant, and is explicitly tied to the defendant's right to a fundamentally fair trial, a trial in which the determination of guilt or innocence is 'just' and 'reliable.'

Id. at 392-393. Fretwell's right to be free from the arbitrary imposition of the death penalty is a right no less personal and fundamental than his right to counsel. It is something to which he is entitled by the Constitution. To recognize that right in no way confers upon him a windfall such as a defendant would receive when illegally seized but reliable evidence is excluded from a trial. At the time of his trial Fretwell was entitled to receive the

benefit of *Collins*, and was only deprived of it by counsel's ineffective assistance. As a result, he was deprived of a fundamentally fair trial. The death sentence he received is neither just nor reliable, and should not stand.

E. The Continuing Validity of *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied* 474 U.S. 1013 (1985).

As stated above, petitioner's argument for reversal in this case is dependent upon the overruling of *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied* 474 U.S. 1013 (1985). It is respondent's contention that the case of *Perry v. Lockhart*, 871 F.2d 1384, *cert. denied* 493 U.S. 959 (1989), in which the Eighth Circuit overruled *Collins*, represents a misapplication of the holding in *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed. 2d 568 (1988). *Lowenfield* does not overrule the "double-counting" prohibition of *Collins*, and the holding in *Perry* represents an over-expansion of *Lowenfield*.

Because of material differences in the Arkansas and Louisiana capital murder statutory schemes, the rule of *Lowenfield* does not necessarily extend to the Arkansas statutory scheme. The reasoning of *Collins* prevails and the case should not have been overruled.

In rejecting the argument that duplication of an element of the crime by its use as an aggravating circumstance rendered petitioner Lowenfield's sentence constitutionally infirm, this Court held the constitutionally required narrowing function in capital schemes could be accomplished either by narrowing the definition of capital offenses at the guilt stage or by providing for narrowing by jury findings of aggravating circumstances.

Lowenfield v. Phelps. The "narrowing" role aggravating circumstances play depends upon how narrowly a state defines capital offenses in the first instance. Correspondingly, whether an element of the crime may also be used as an aggravating circumstance depends upon the particular statutory scheme involved and the role the aggravating circumstances serve in obtaining the constitutionally mandated narrowing.

The Louisiana statute, as noted in *Lowenfield*, narrowly defines first degree murder (its capital offense) as follows:

> . . . the killing of a human being
>
> (1) when the offender has specific intent to kill or inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery or simple robbery;
>
> (2) when the offender has specific intent to kill or to inflict great bodily harm upon a fireman or police officer engaged in the performance of his lawful duties;
>
> (3) when the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or
>
> (4) when the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given or has received anything of value for the killing;

(5) when the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve years.

La. Rev. Stat. Ann. § 14.30(A)

The Louisiana statute defines capital murder "as something more than intentional killing". *Sawyer v. Whitley*, ___ U.S. ___, 112 S. Ct. 2514, 2520, ___ L.Ed.2d ___ (1992). In Louisiana a defendant is not eligible for the death penalty unless found guilty of first degree murder, a category of murder more narrowly defined by statute than the general category of homicide. *Stringer v. Black*, ___ U.S. ___, 112 S. Ct. 1130, ___ L.Ed.2d ___ (1992). Exposure to the death penalty occurs at the guilt stage only upon a showing of an intentional homicide and the commission of the homicide under circumstances constituting one of five statutory aggravating criteria. *Sawyer v. Whitley*, 112 S. Ct. at 2523. Thus, in essence, the Louisiana statute requires the jury to find the existence of statutory aggravating circumstances before a finding of guilt of capital murder, and before a defendant becomes death eligible.

Texas, like Louisiana, narrowly defines the category of murders that qualify for a finding of guilt of capital murder, and give rise to exposure to the death penalty. *Jurek v. Texas*, 428 U.S. 262, 270-271 (1976). Again, like the Louisiana statute, Texas' statute requires, before a finding of guilt, proof of both an intentional or knowing murder and its commission under certain statutory aggravating circumstances. Only after both of these findings are made may a defendant be found guilty of capital murder and thereafter exposed to the death penalty. V. Tex. C. A. Penal Code § 19.03.

The Arkansas statute defining capital murder under which Perry and respondent were tried, Ark. Code Ann. § 5-10-101, defines the offense in pertinent part as follows:

(a) acting alone or with one or more other persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary or escape in the first degree, and in the course or in furtherance of the felony or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life.

The Louisiana and Arkansas definitions of felony murder differ in at least one important way: Louisiana requires a specific intent to kill or to inflict great bodily harm; Arkansas requires only that the killing occurred "under circumstances manifesting extreme indifference to the value of human life." There is no specific or general intent requirement in Arkansas. Arkansas defines capital murder as something far *less* than intentional killing. *Sawyer v. Whitley*, 112 S.Ct. at 2520. Thus, the Louisiana statute is far narrower in its definition of a capital offense than is the Arkansas statute.

This Court has compared the respective statutes of Arkansas and Louisiana on several occasions and reached a conclusion which was ignored or simply overlooked in *Perry*. In *Enmund v. Florida*, 458 U.S. 782, 790 n. 8, (1982), the Court concluded that Louisiana was one of eight states that "made knowing, intentional, purposeful or premeditated killing an element of capital murder."

Arkansas, on the other hand, was determined to be one of three that "require proof of a culpable mental state short of intent, such as recklessness or extreme indifference to the value of human life." *Id.*, at 790, 793-794 n. 15.

In *Tison v. Arizona*, 481 U.S. 137 (1987), the Court revisited the *Enmund* analysis and again commented upon the differences between the Louisiana and Arkansas statutes. Louisiana, it stated, "forbids imposition of the death penalty even though the defendant's participation is major and the likelihood of killing is so substantial as to raise an inference of extreme recklessness." *Id.* at 154. Arkansas, it was noted, had held that "substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even in the absence of an intent to kill. See e.g. *Clines v. State*, 280 Ark. 77, 84, 656 S.W.2d 684, 687 (1983)." *Ibid.*

Therefore, under *Enmund*, *Tison*, and *Lowenfield*, Louisiana can be said to have performed the narrowing function at the guilt phase of the trial, but the same statement cannot be made of Arkansas. Although *Tison* held that a mental state of reckless indifference, coupled with major participation in the felony, is sufficient to satisfy the *Enmund* culpability requirement, both *Enmund* and *Tison* implicitly recognized that this lesser cupable state pulls more defendants into the net of potential capital liability and exposure to the death penalty. This is particularly so because the Arkansas courts have given the phrase, "manifesting extreme indifference to the value of human life" such expansive and varying interpretations that the phrase can be applied to virtually any conduct which results in death. Consequently, in Arkansas, it is only at

the penalty phase, through weighing of aggravating circumstances against mitigation evidence, that the constitutionally mandated narrowing function occurs. And where, as in *Perry* and the instant case, an aggravating circumstance is duplicative of an element of the offense, the narrowing function is not accomplished and the sentence cannot stand under the Eighth Amendment.

The Arkansas statutory scheme differs from those of Texas and Louisiana in other material respects. Like the statutory schemes existing in Florida, see *Sochor v. Florida*, ___ U.S. ___, 112 S.Ct. 2114 (1992), and Mississippi, see *Stringer v. Black*, ___ U.S. ___, 112 S.Ct. 1130 (1992), Arkansas is a weighing state. Under Arkansas law, after a jury has found a defendant guilty of capital murder, and has also found the existence of at least one statutory aggravating circumstance, it is directed to weigh the aggravating factor or factors against all evidence presented in mitigation. This difference in the statutes is not one of semantics but "of critical importance". *Stringer v. Black*, 112 S.Ct. at 1137. The extreme importance of this mandatory weighing process under the Arkansas death penalty scheme has long been emphasized. *See, e.g., Giles v. State*, 261 Ark. 413, 549 S.W.2d 479, cert. denied, 434 U.S. 894 (1977). Because of the Arkansas requirement that the jury weigh statutory aggravating circumstance(s) against mitigating evidence, a requirement not found in either the Texas or Louisiana scheme, the rationale of *Lowenfield* is not applicable to the Arkansas scheme. *Stringer v. Black*, 112 S.Ct. at 1138; *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991) (distinguishing *Lowenfield* due to the weighing requirement under the Wyoming statute) and *State v. Middlebrooks*, ___ S.W.2d ___, No. 01-S-01-9102-

CR-00008 (Tenn. September 8, 1992) (distinguishing *Lowenfield* due to the failure of the Tennessee statute to narrow the class of death eligible offenders at the guilt stage).

Another, and perhaps more important distinguishing factor under Arkansas law, is that Arkansas is not only a weighing state like Mississippi and Florida, but it also is a "justification" state. A defendant found guilty of capital murder in Arkansas cannot be sentenced to death unless the jury, at the penalty phase, makes three separate findings. The jury must find the existence of at least one statutory aggravating circumstance. The jury must then weigh the aggravating circumstance or circumstances to determine whether they outweigh the mitigating evidence beyond a reasonable doubt. Finally, the jury must also make the determination that the aggravating circumstance or circumstances justify the sentence of death beyond a reasonable doubt. *Williams v. State*, 274 Ark. 9, 621 S.W.2d 686 (1981); *Collins v. Lockhart*, 754 F. 2d 258 (8th Cir.), cert. denied, 474 U.S. 1013 (1985); *Johnson v. State*, 308 Ark. 7, 823 S.W.2d 800 (1992).

The failure of the jury to make this third, independent finding results in a sentence of life without parole. Ark. Code Ann. § 5-4-603(c)(1987). The "justification" requirement underscores the fact that the constitutionally required narrowing function under Arkansas' statutory scheme can only occur at the penalty phase because an Arkansas capital defendant who has been found guilty of capital murder is not death eligible absent this finding by the jury. This is so even if the jury has engaged in the required weighing and determined that aggravating circumstances outweigh all the evidence in mitigation. If the

jury's consideration of aggravating factors during the sentencing phase is of no constitutional significance because the requisite differentiation among defendants for death penalty purposes has taken place during the jury's deliberation with respect to guilt, then the inclusion of the "weighing" and "justification" requirements in the Arkansas scheme can only be deemed a superfluous act on the part of the Arkansas legislature.

If the above requirements are of no constitutional significance, then as long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty. *Stringer v. Black*, 112 U.S. at 1137. This is because there is no constitutional violation resulting from the introduction of an invalid factor in an earlier stage of the proceedings, provided the reviewing court determines the invalid factor would not have made a difference to the jury's determination. *Ibid.* Where either the weighing or the justification requirement is of constitutional narrowing consequence, a reviewing court cannot assume the invalid factor would not have made a difference, and only constitutional harmless error analysis or reweighing at the trial or appellate level suffices to guarantee the defendant received an individualized sentence. *Ibid.*

The Arkansas Supreme Court has recognized the constitutional significance of both the weighing and justification requirements by refusing to reweigh remaining valid aggravating circumstances against mitigation, recognizing that the weighing process is "peculiarly a function best performed . . . in the first instance by a jury", *Giles v.*

State, 261 Ark. at 424. Further recognition of this principle is evidenced by the Arkansas Supreme Court's refusal to speculate whether a jury would nevertheless conclude any remaining valid aggravating circumstances justified a sentence of death beyond a reasonable doubt. *Williams v. State*, 274 Ark. at 12.

In 1987 the Arkansas statute was amended to mandate a harmless error appellate review when there is error in the jury's finding of the existence of an aggravating circumstance, the jury found no mitigating circumstance, and there exists remaining valid aggravating circumstances. Ark. Code Ann. § 5-4-603(d) & (e) (1987). In enacting this statute the state legislature recognized the important narrowing function performed by the weighing process because it precluded the appellate court from engaging in a harmless error analysis when weighing was performed by the sentencing jury. Harmless error analysis is only allowed when no mitigation was found by the jury, and thus, no weighing was performed. However, due to the important narrowing function these two requirements provide under Arkansas law, the state appellate court has yet to invalidate a jury finding in aggravation and determine the erroneous finding to be harmless. *Sanders v. State*, 308 Ark. 178, 824 S.W.2d 353 (1992) and *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110 (1992).

A review of Arkansas appellate court decisions, and the statute itself, demonstrates that the constitutionally required narrowing function is, and has been since the statute's enactment, provided for by the weighing and justification requirements at the penalty phase. *Ward v. State*, 308 Ark. 415, 827 S.W.2d 110 (1992); contra,

O'Rourke v. State, 295 Ark. 57, 746 S.W.2d 52 (1988) (holding without explanation that the mandated narrowing function was performed at the guilt phase) compare, *Johnson v. State*, 308 Ark. 7, 823 S.W.2d 800 (1992) (noting at the time *O'Rourke* was decided the legislature had narrowed the class at both stages but that now the narrowing primarily occurs at the penalty phase).

Sixteen years of appellate decision and restatement undercut the conclusory statement in *O'Rourke* that the narrowing function is, or has ever been, performed at the guilt stage under the Arkansas statute, thereby negating the constitutional requirement of "an additional aggravating circumstance finding at the penalty phase". *O'Rourke*, 295 Ark. at 64.

In *Enmund*, this Court mentioned that although it was the final arbiter of Eighth Amendment jurisprudence, the judgments of legislatures were a factor to be considered and weighed heavily as relevant to the constitutional inquiry. 458 U.S. at 797. The importance of the legislatures' judgments was also recognized in *Tison*. The Court noted that many of the state statutes discussed in *Enmund* were unchanged, but, significantly, pointed out that other states had either modified their felony murder statues to require a finding of an intent to kill or at least intent to employ lethal force, or had eliminated felony murder as a capital offense altogether. 481 at 152, n. 4.

In evaluating the Arkansas statute, it is evident, that contrary to the narrowing response of other states to meet the concerns discussed in *Enmund*, Arkansas has not reevaluated its statute, but instead ignored *Enmund* and

its teachings by expanding its definition of capital murder. Rather than narrowing its definition of felony murder, Arkansas has expanded the definition of capital murder to include all premeditated and deliberate murders. As opposed to narrowing death eligible defendants at the guilt stage, Arkansas has not expanded the class of death eligible defendants under its statute to render it constitutionally infirm under *Furman v. Georgia*, 408 U.S. 238 (1972). The broad statutory interpretation of capital murder in Arkansas dispels any notion that it performs the constitutionally required narrowing function at the guilt phase, and makes indispensable the role of aggravating circumstances at the penalty phase. Therefore, any duplication in the myriad elements of the crime of capital murder invites arbitrariness and prohibits any meaningful narrowing at either stage. For this reason, *Lowenfield*, to the extent that it suggests that "double-counting" is permissible, is inapplicable to the Arkansas scheme and *Collins* should not have been overruled.

F. The Remedy for the Deprivation of Fretwell's Sixth Amendment Right to the Effective Assistance of Counsel

It is respondent's position that the only remedy which will remove the taint of prejudice which he has sustained is to unconditionally reduce his sentence to life without parole. To force Fretwell to face resentencing, without the benefit of the rule in *Collins*, would perpetuate the prejudice he suffered at his original trial. There is a "reasonable probability", as required under *Strickland's* test, if not a near certainty, that respondent would not have received the death sentence in the absence of his

counsel's ineffective assistance, and the fact that Collins was overruled does not change the situation.

As noted by petitioner, federal courts conducting habeas corpus review pursuant to 28 U.S.C. Sec. 2254(d) are to " . . . dispose of the matter as law and justice require." 28 U.S.C. Sec. 2243. Petitioner's Brief p. 57. This Court can and should affirm the decision of the Eighth Circuit to unconditionally reduce respondent's sentence to life without parole, the only meaningful remedy available.

CONCLUSION

The respondent was denied his Sixth Amendment right to the effective assistance of counsel at his state court capital murder trial, and, for this reason, the Court should affirm the opinion of the United States Court of Appeals for the Eighth Circuit granting relief to respondent.

Should the Court reach the issue of the applicability of *Lowenfield v. Phelps* to Arkansas' capital punishment scheme, it should recognize the significant distinctions between the Arkansas and Louisiana statutes, and should hold that *Lowenfield* does not apply to Arkansas.

Respectfully submitted,

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